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DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

7 CFR Part 614

Docket No. NRCS-2011-0017

RIN 0578-AA59

Appeal Procedures

AGENCY: Natural Resources Conservation Service.

ACTION: Final Rule.

SUMMARY: The Natural Resources Conservation Service (NRCS), United States Department of Agriculture (USDA) issues this final rule amending NRCS' informal appeal procedures as required by Title II of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (the 1994 Act). This final rule amends regulations promulgated by the interim final rule published on May 16, 2006, and also includes new language to address comments and make procedural and structural changes in relation to 6 years of implementation.

EFFECTIVE DATE: This rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ed Nilson, Appeals and Equitable Relief Specialist, Compliance Division, Department of Agriculture, Natural Resources Conservation Service, 5601 Sunnyside Avenue, Room 1-1104-A, Beltsville, Maryland 20705. Telephone: (301) 504-1673; E-mail: ed.nilson@wdc.usda.gov.

Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA Target Center at (202) 720-2600 (voice and TDD).

SUPPLEMENTARY INFORMATION:

Regulatory Certifications

Executive Order 12866

This final rule has been determined to not be significant under Executive Order 12866 and will not be reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

The Regulatory Flexibility Act is not applicable to this final rule because this action will not have a significant economic impact on small entities.

Environmental Analysis

The environmental impacts of this final rule have been considered in accordance with the provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 et seq., and NRCS has concluded that promulgation of this final rule is categorically excluded from NEPA's requirement from an environmental impact analysis under USDA regulations, 7 CFR 1b.3(a)(1). Actions implemented under this final rule fall in the category of policy development, planning, and implementation which relates to routine activities and similar administrative functions, and no circumstances exist that would require preparation of an environmental assessment or environmental impact statement.

Civil Rights Impact Analysis

A review of the NRCS Appeal Procedures final rule has been directed towards the identification of actual or potential civil rights issues. The review reveals no factors indicating the NRCS Appeal Procedures would have a disproportionate adverse civil rights impact for producers who are minorities, women, or persons with disabilities.

Outreach and communication strategies are in place to ensure all program participants will be provided the same information to allow them to make informed decisions regarding the use of their lands that will affect their participation in USDA programs. The NRCS Appeal Procedures provisions apply to all persons equally regardless of race, color, religion, sex, age, national origin, marital status, familial status, sexual orientation, or disability, or because all or part of an individual's income is derived from any public assistance program.

Paperwork Reduction Act

This final rule does not contain reporting or recordkeeping requirements subject to the Paperwork Act.

Executive Order 13132

This final rule has been reviewed in accordance with the requirements of Executive Order 13132, Federalism. NRCS has determined this final rule conforms with the Federalism principles set forth in the Executive Order; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities on the various levels of government.

Executive Order 13175

Executive Order 13175 requires agencies to consult and collaborate with Indian Tribes if policies or actions have substantial direct effects on Tribes. NRCS has determined that this regulation does not have a substantial direct effect on Indian Tribes since these regulatory provisions do not impose unreimbursed compliance costs or preempt Tribal law. As a result, consultation is not required.

Unfunded Mandates Reform Act of 1995

This action does not compel the expenditure of \$100 million or more in any one year (adjusted for inflation) by any State, local, or Tribal governments, or anyone in the private sector. Therefore, a statement under section 202 of the Unfunded Mandates Reform Act of 1995 is not required.

Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994

The Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Title III, section 304, requires that for each proposed major regulation with a primary purpose to regulate issues of human health, human safety, or the environment, USDA is to publish an analysis of the risks addressed by the regulation and the costs and benefits of the regulation. NRCS has determined this final rule is not a proposed major regulation; therefore, a risk assessment does not apply to this final rule.

Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)

This final rule is neither major nor significant; therefore, it is not subject to the SBREFA 60-day requirement. Accordingly, this final rule is effective with publication in the Federal Register.

Federal Assistance Programs

This final rule has a potential impact on all programs listed in the Catalog of Federal Domestic Assistance in the Agency Program Index under the Farm Service Agency (FSA) and NRCS. Other assistance programs are also affected.

Government Paperwork Elimination Act

NRCS is committed to compliance with the Government Paperwork Elimination Act and the Freedom to E-File Act, which require government agencies, in general, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. This final rule requires that a program participant must make a written request for an appeal for a program administered by NRCS.

Background and Purpose

On May 16, 2006, the Chief of NRCS published an Appeal Procedures interim final rule (71 FR 28239). Section 275 of the 1994 Act, 7 U.S.C. 6995, requires USDA agencies to hold informal hearings, at the request of a participant, for the decisions they render. NRCS interprets the “informal hearing” requirement to require the agency to provide opportunity for an informal appeal at the agency level. This final rule amends the interim final rule published May 16, 2006, (71 FR 28239) in response to comments received from the public and during implementation.

NRCS' goal in promulgating the informal appeal procedures is to facilitate, at the agency level, the resolution of disputes arising from adverse technical determinations and program decisions. NRCS' informal appeal process establishes several means through which participants can obtain a review by NRCS personnel who have detailed knowledge of agricultural conservation operations as well as expertise in farm and ranch management. After a decision rendered by NRCS becomes final, participants may pursue the appeals processes set forth at 7 CFR parts 11, 614, and 780, as appropriate.

Public Comment

NRCS received 13 responses with a total of 64 comments from the public in response to the request for comments in the 2006 interim final rule. Of the 13 responses, one response was received from an individual, two responses were from Federal Government employees, eight responses were from state government employees, and two responses were received from non-profit organizations. In addition, NRCS received an additional 18 responses or suggestions from agency personnel and program participants since the 2006 rule was published.

NRCS received 82 comments on the following sections of the 2006 rule: Rule in general – 1 comment; 7 CFR 614.2, Definitions – 6 comments; 7 CFR 614.4, Decisions not subject to informal appeal procedures – 5 comments; 7 CFR 614.6, Agency records and decision notices – 2 comments; 7 CFR 614.7, Preliminary technical determinations – 11 comments; 7 CFR 614.8, Final technical determinations – 10 comments; 7 CFR 614.9, Program decisions – 1 comment; 7 CFR 614.10, Appeals before the Farm Service Agency county committee – 2 comments; 7 CFR 614.11, Mediation – 38 comments; 7

CFR 614.12, Transcripts – 1 comment; 7 CFR 614.13, Appealability review – 2 comments; 7 CFR 614.14, Computation of time – 1 comment; 7 CFR 614.15, Implementation of final agency decisions and 7 CFR 614.16, Participation of third parties in NRCS proceedings – 1 comment. A majority of the responses received regarded mediation, with the majority of these comments coming from the eight-state governmental responses.

Section by section analysis

NRCS received one comment commending the agency for including helpful clarification and better organizing the rule, and one comment from an individual that was not relevant to this rulemaking regarding agri-business mediators. NRCS is making changes to the substance of the existing informal appeals regulation in order to address the comments received since the 2006 rulemaking, as well as to improve the informal appeals process. The following text describes the changes made to each section of the rule.

Section 614.1 — General

This section remains unchanged and explains the scope and purpose of the agency’s informal appeal regulation. No comments were received on this section.

Section 614.2 — Definitions

NRCS received a total of six comments on this section. One comment suggested NRCS clarify who may accept an appeal request and the date an appeal request is considered filed within the definition of “appeal.” NRCS finds merit in this comment

and has amended the current definition to reflect that an appeal request is perfected and considered filed when the appropriate accepting official receives the participant's request within the 30 days from the date that the participant receives the adverse decision. The term "agency record" has also been amended to refine this definition and help improve the agency's decisionmaking and documentation process.

NRCS also added several definitions in response to three comments received during rule implementation. Specifically, definitions have been added for the terms "adverse decision" and "agency exhibit" to provide a more precise definition on these terms.

In response to two comments regarding confusion as to the difference between technical determinations and program decisions, NRCS agrees there is some confusion and has amended the terms "Preliminary technical determination," "Final technical determination," and "Program decision." The new definitions limit preliminary and final technical determinations to those decisions issued pursuant to the Highly Erodible Land and Wetland Conservation (HELC/WC) provisions solely. "Program decision" is to be issued to include any type of decision for programs other than those issued pursuant to HELC/WC provisions.

Section 614.3 — Applicability of appeal procedures

No comments were received on this section. This section sets forth the types of decisions that are appealable. In addition, since promulgation of the 2006 interim rule, new programs have been authorized under Title XII of the Food Security Act of 1985, as amended, and some programs have been repealed. This section amends the current regulation by updating the listing of programs to which these informal appeals apply. NRCS amends this section to ensure the person requesting an appeal is the USDA program participant affected by the adverse decision by adding subparagraph (c)(2) to 7 CFR 614.3 (c).

Section 614.4 — Decisions not subject to appeal

This section provides information on issues that are not considered to be appealable under this final rule. NRCS received a total of five comments.

One commenter stated that denial of appeal rights to the National Appeals Division (NAD) when NRCS denies a participant's request for equitable relief is not in accordance with the statutory construction. NRCS agrees a denial of equitable relief is one example of an agency adverse decision which is subject to NAD's jurisdiction pursuant to 7 U.S.C. 6991(1). This is addressed in section 614.9(e) of the final rule which states that NRCS will provide notice of appeal rights to NAD on program decisions when equitable relief is denied by the Chief or the State Conservationist.

Four other comments received over the implementation period are regarding the interpretation of what constitutes a decision adverse to the individual participant. NRCS

is therefore amending these appeal procedures to clarify specifically those issues that cannot be challenged through the appeals process.

NRCS amends this section to clarify that decisions made by the Office of the General Counsel concerning real property title standards issued by the Attorney General are not appealable to NAD.

Section 614.5 — Reservation of authority

No comments were received on this section. Under this section, the Chief of NRCS or the FSA Administrator as the Vice President of the Commodity Credit Corporation (CCC), and the Secretary reserve the authority to determine, at any time, any question arising under programs within their respective authority or from reversing or modifying any program decision or technical determination made by NRCS or the CCC.

Section 614.6 — Agency records and decision notices

This section sets forth the agency's policy that all decisions under this part must be based upon an agency record. A total of two comments were received. The agency record is an administrative record comprised of all the documentation, including reports, maps, photographs, correspondence, surveys, etc., reviewed when making his or her decision. In determining which documents are included in the agency record, the decisionmaker will include all documents relevant to the adverse decision. The agency is responsible for compiling the agency record and maintaining it for each decision that has been issued. A copy of the agency record is available to the participant upon request. The completeness of the agency record, as well as the consideration of all relevant facts,

is critical to an effective appeal process. Consequently, development of the agency record is being emphasized in this rulemaking.

This section also sets forth agency policy on decision notices including content, deadlines, and methods of delivery. Specifically, NRCS policy requires that an adverse program decision or technical determination must: (1) be in writing, (2) set forth its factual basis, and (3) explain its application of relevant statute, regulations, and policy. NRCS must send written notice of its decision to the participant via certified mail, return receipt requested, or any other type of delivery notification mailing or delivery including hand delivery, within 10 working days of rendering a technical determination or program decision. This conforms to section 6994 of the 1994 Act, which requires that the Secretary provide written notice of an adverse decision and notice of appeal rights no later than 10 working days after the decision is made.

Two commenters provided that NRCS may not limit the applicability or availability of the NAD formal appeals procedures as implied in the regulation at 7 CFR 614.6(b)(3). NRCS has removed the “if applicable” from this provision.

Section 614.7 — Preliminary technical determinations

NRCS received a total of 11 comments on this section, with 2 comments on the preliminary technical determinations more applicable to the actual definition of a preliminary technical determination. NRCS addresses these comments by amending the regulation at 7 CFR 614.7(a) by adding a statement that these types of determination are limited to those rendered under the HELC/WC provisions. Currently, technical determinations include any matter of a technical nature for any type of program

regardless of the statutory authority. These comments suggested that it is confusing to include technical determinations for decisions other than those issued under the HELC/WC provisions. NRCS agrees and is changing the regulations to eliminate this confusion. Preliminary technical determinations will include only those initial written technical determinations provided to a USDA program participant authorized under HELC/WC provisions.

Two additional comments were received concerning the option for mediation provided at 7 CFR 614.7(a)(2) regarding the responsibility for notifying the participant of remaining appeals options following mediation of the preliminary technical determination. The rule currently allows a program participant who has been issued a preliminary technical determination to request either mediation or reconsideration with a field visit. If mediation has been selected as the first option, and there is still time remaining to request a field visit, the participant may request this preliminary technical review option. If the participant comes to a mediated agreement during this period, then the rule at 7 CFR 614.11(d) requires waiver of all further appeal rights as to that determination or portion of that determination. If mediation is unsuccessful, and time for any further preliminary appeal options has expired, NRCS will issue a final technical determination that is appealable to either NAD under 7 CFR part 11, or to the FSA county committee as provided at 7 CFR 614.8 and 614.10. Therefore, no changes will be made to this section.

NRCS received one comment on 7 CFR 614.7(a)(2) contending the requirement that a participant request mediation through the designated NRCS official as provided in

7 CFR 614.11(a) is burdensome. This comment will be addressed in 7 CFR 614.11(a) rather than in 7 CFR 614.7(a)(2).

Five other comments requested clarification of whether a field visit is the only option, or if another location for review of the preliminary technical determination is available. Currently, the regulation has been interpreted in a limiting manner that the review must be completed in the field because of the actual wording in the rule. NRCS has reviewed the original basis for this review and reconsideration, and finds that the goal of review and reconsideration as stated in the 2006 rule at 71 FR 28241 is to “improve the accuracy of technical determinations and sufficiency of the administrative record upon which the technical determination is based.” Further, a field visit is useful to develop additional information that was not previously known to NRCS or the participant or to accept what has been found. Therefore, NRCS has determined the field visit to the actual site on the farm is not required to have a successful reconsideration, and is amending 7 CFR 614.7(a)(1) to include either a field visit or office visit are options available to the participant. Regardless of how the reconsideration is conducted, the main purpose is to “afford an adequate informal appeal process at the agency level where such expertise resides [and] is essential to effective program administration.” (See 71 FR 28239, 28243 (May 16, 2006).)

NRCS is also providing additional clarification of 7 CFR 614.7(b) by separating the four major actions needed to complete preliminary technical determination reconsideration.

One commenter stated that NRCS has no authority to require waiver of statutory rights to the informal review as is currently provided at 7 CFR 614.7(d). This provision

does not require any participant to waive his or her rights to an informal review. Rather, the regulation allows participants to immediately proceed to their informal appeal rights of the FSA county committee under 7 CFR 614.8(b)(1) or exercise their formal appeal rights to NAD under 7 CFR 614.8(b)(2). The provision is one of “expedited finality” and has been provided for participants who want a final technical determination so that they may begin required actions as determined by NRCS (e.g., wetland restoration) or to proceed with another type of action requiring a final HELC/WC determination, such as a Farm Credit loan.

Section 614.8 — Final technical determinations

This section sets forth the informal appeal procedures available when preliminary technical determinations become final. NRCS received a total of 10 comments on this section, with one comment claiming that NRCS precluded a participant’s rights to appeal to NAD and 9 comments claiming that the process with technical determinations and program decisions is confusing. NRCS agrees and is amending 7 CFR 614.7 and 614.8 to be limited to appeals of HELC/WC technical determinations and 7 CFR 614.9 limited to programs administered by NRCS to reduce any further confusion.

Section 614.9 — Program decisions

NRCS received one comment recommending that NRCS clarify the difference between an appeal of a technical determination and an appeal of a program decision. This section sets forth the informal appeals procedures available for program decisions. Currently, program decisions are decisions issued for conservation programs

administered by NRCS that relate to the administration of a conservation program.

Unlike HELC/WC technical determinations, program decisions are issued as “final decisions” meaning they may be appealed directly to NAD, or if the program decision is made under a Title XII program, additionally, but before NAD, to the FSA county committee.

NRCS agrees and has made changes to this section, as well as in 7 CFR 614.7 and 614.8.

Section 614.10 — Appeals before the Farm Service Agency county committee

This section provides that any adverse decision issued under a Title XII program may be appealed to the FSA county committee. NRCS received two comments on this section. NRCS received one comment concerning whether a participant must exercise the informal appeal before the FSA county committee prior to requesting a formal appeal from NAD. As provided in the preamble to the 2006 interim final rule (71 FR 28239, 28242), and pursuant to 7 U.S.C. 6995 and 7 CFR part 780, a participant may seek an optional informal review by an FSA county committee of an NRCS final technical determination or program decision made for a conservation program authorized under Title XII. A participant may also choose to forego the FSA county committee appeal option and appeal directly to NAD under 7 CFR part 11.

The other commenter recommended the rule should better explain the FSA county committee’s jurisdictional limitations. The authorizing statute, 7 U.S.C. 6932(d)(2)(A), provides that the county committee must provide a method for obtaining review of NRCS adverse technical and program decisions. Both NRCS and FSA appeal procedures

explain the requirements that the FSA county committee must adhere to when hearing informal appeals of NRCS adverse decisions. Both agencies have issued further instructions in the applicable policy manual or handbook. NRCS does not believe an amendment to this section is necessary.

Section 614.11 — Mediation

NRCS received 38 comments on 7 CFR 614.11, as follows: 7 CFR 614.11 (a) – 5 comments; 7 CFR 614.11(c) – 7 comments; 7 CFR 614.11(e) – 10 comments; and 7 CFR 614.11(g) – 16 comments.

Five of the comments suggested that participants should be able to request mediation from the mediation service provider rather than through the designated NRCS official as provided in 7 CFR 614.11(a). NRCS agrees and is changing this to the official designated in the decision notice.

Five commenters suggested that NRCS adopt the language in the NAD Rule at 7 CFR 11.5(c)(1) with regard to stays of time on an appeal for mediation in 7 CFR 614.11(c). NRCS agrees and is changing the rule in this section to reflect that a request for mediation stops the running of the 30-day timeframe for requesting an appeal. Two comments suggested that NRCS amend the amount of time allowed for mediation of technical determinations when a field review might be required. NRCS agrees a field visit might require additional time, and this is addressed by allowing the parties to agree to an extension of the 30-day timeframe.

Ten comments were received on 7 CFR 614.10(e) stating a concern that there is no clear guidance on finalizing the mediation settlement agreement where the NRCS

representative did not have authority to bind NRCS. The comments provided that NRCS should vest their representative with authority to bind the agency in mediation or have the person that can make those decisions present at the mediation or in contact by telephone. The commenters believed that otherwise, due process was being denied. NRCS believes the current rule provides sufficient safeguards, and no changes will be made to this paragraph.

NRCS received a total of 16 comments on 7 CFR 614.11(g). Of the 16, 8 did not agree with use of any materials other than the mediation agreement in administrative or judicial proceedings. Six comments were concerned about the use of notes or summary reports by one party or the other in the absence of both parties during or after the mediation session with parties not named in the agreement to mediate, and two comments were received concerning whether parties to mediation may participate in further administrative or judicial proceedings.

The commenters suggest that the use of notes or summaries developed during mediation should not be allowed because there is a risk of distorting or taking those notes and summaries out of context. The commenters suggested that NRCS amend this section to include the following: “during mediation, if any party needs to contact an advisor not present, the party will secure the consent of the other party(s) before communicating with that person not present.” NRCS does not agree, as the agency must have the ability to contact officials not present at the mediation, and making such contact does not affect the confidentiality of the mediation process.

Except where the rule provides for NRCS to discuss settlement issues with another USDA official should the NRCS representative not have authority to decide an

issue, NRCS finds the rule provides the appropriate confidentiality of the parties in the mediation process. In addition, 5 U.S.C. 574 limits both the disclosure and admissibility of such notes or summaries. Therefore, NRCS declines to amend the final rule.

Regarding the comments on whether any of the mediation participants can testify about or furnish documents of the mediation in administrative or judicial proceedings, NRCS is amending this section to clarify confidentiality expectations as they pertain to further administrative or judicial proceedings. It is noted, however, 5 U.S.C. 574 contains the limitations (with exceptions) to such testimony or provision of documents.

Section 614.12 — Transcripts

This provision was added in the 2006 interim final rule. One comment suggested that banning recordings of the proceedings by the participant is wrong and does not comport with the NAD rules. NRCS disagrees with this comment. The State Conservationist's hearing is an informal appeal hearing, not a formal administrative hearing held by NAD. In order to maintain the informal atmosphere and to encourage full participation by both the participant and NRCS, the recording of an informal proceeding is a disincentive to open communication and resolution of the appeal.

Section 614.13 — Appealability review

This section was added in the 2006 interim final rule that would allow the State Conservationist to make decisions regarding Appealability. Two comments were received. NRCS is amending this section to provide that if the agency decides the

decision at issue is not appealable, then NRCS must provide review rights to the participant under the NAD rules at 7 CFR 11.6(a).

Section 614.14 — Computation of time

This section was added in the 2006 interim final rule. NRCS received one comment regarding time remaining after mediation to request further appeal action. This comment was more adequately addressed under 7 CFR 614.11.

Section 614.15 — Implementation of final NAD determinations

This section was added in the 2006 interim final rule. NRCS received one comment stating that NRCS cannot delay implementation of a NAD determination beyond the 30 days specified in the statute. NRCS' comments on this section in the preamble were not intended to delay implementation of a final administrative decision. As provided in the rule, NRCS will implement all final NAD administrative determinations within 30 days after the decision becomes final. NRCS is amending this section to add new requirements on implementation of NAD final administrative appeal decisions as provided in section 14009 of the Food Conservation and Energy Act of 2008 (Farm Bill). This amendment to the appeals reporting requires the agency to provide a biannual report to the Chairman of the Senate Committee on Agricultural, Nutrition and Forestry and the Chairman of the House Committee on Agriculture on the status of implementing final NAD determinations along with reasons why a decision has not been implemented. The agency must publish these reports on the agency's Web site and keep

the site updated with actions taken on any determinations not implemented within the required timeframe.

Section 614.16 — Participation of third parties in NRCS proceedings

This is a new section added in the 2006 interim final rule. The only comment received pertains to a correction of a typographical error that repeats the word party in the first sentence. NRCS will correct the error in this final rule.

Section 614.17 — Judicial review

This section was added in the 2006 interim final rule. No comments were received on this section and no changes have been made.

List of Subjects in 7 CFR Part 614

Administrative practice and procedure, Agriculture, Agriculture commodities, Alternative Dispute Resolution, Appeal, Conservation programs, Contracts, Decisions, Determinations, Easements, Farmers, Farmland, Mediation, Soil conservation.

For the reasons stated in the preamble, 7 CFR part 614 is revised to read as follows:

PART 614—NRCS APPEAL PROCEDURES

Sec.

614.1 General.

614.2 Definitions.

- 614.3 Decisions subject to informal appeal procedures.
- 614.4 Decisions not subject to informal appeal procedures.
- 614.5 Reservation of authority.
- 614.6 Agency records and decision notices.
- 614.7 Preliminary technical determinations.
- 614.8 Final technical determinations.
- 614.9 Program decisions.
- 614.10 Appeals before the Farm Service Agency county committee.
- 614.11 Mediation.
- 614.12 Transcripts.
- 614.13 Appealability review.
- 614.14 Computation of time.
- 614.15 Implementation of final NAD decisions.
- 614.16 Participation of third parties in NRCS proceedings.
- 614.17 Judicial review.

Authority: 5 U.S.C. 301; 7 U.S.C. 6932 and 6995; and 16 U.S.C. 3822(a).

§ 614.1 General.

This part sets forth the informal appeal procedures under which a participant may appeal adverse technical determinations or program decisions made by officials of the Natural Resources Conservation Service (NRCS), an agency under the Department of Agriculture (USDA). These regulations reflect NRCS policy to resolve at the agency level, to the greatest extent possible, disputes arising from adverse technical determinations and program decisions made by NRCS. Once a decision is rendered final

by NRCS, participants may appeal to the National Appeals Division (NAD) as provided for under 7 CFR part 11, or to the Farm Service Agency (FSA) county committee pursuant to 7 CFR part 780 for decisions rendered under Title XII of the Food Security Act of 1985, as amended, 16 U.S.C. 3801 et seq. (Title XII).

§ 614.2 Definitions.

The following definitions are applicable for the purposes of this part:

Adverse decision means the final technical determination or the program decision issued by NRCS that is adverse to the individual participant and not a matter of general applicability.

Agency means NRCS and its employees.

Agency exhibit means those documents or materials that are used during the hearing to further explain, differentiate, or distinguish a point, concept, or criteria in an appeal but that were not those materials or documents that the agency relied upon in making the adverse decision. Agency exhibits are labeled alphabetically A, B, C, etc., with total pages in each exhibit numbered.

Agency record means all documents and materials, including documents submitted by the participant and those generated by NRCS, which the agency relies upon and bases its program decision or technical determination. The agency record will include all documents relevant to the adverse decision. NRCS maintains the agency record and will, upon request or appeal, make available a copy of the agency record for a specific adverse decision to the participant(s) involved in the dispute. Agency record documents are labeled numerically 1, 2, 3, etc., in the lower right hand of the document.

Appeal means a written request by a participant asking for review (including mediation) of an adverse NRCS technical determination or program decision under this part. An appeal must set out the reason(s) for appeal and include any supporting documentation. An appeal is considered filed when the participant's request has been received by the accepting official as indicated in the adverse decision notice.

Chief means the Chief of NRCS or his or her designee.

Commodity Credit Corporation means a wholly owned government corporation within USDA.

Conservation district means any district or unit of State or local government developed under State law for the express purpose of developing and carrying out a local soil and water conservation program. Such district or unit of government may be referred to as a conservation district, soil and water conservation district, natural resource district, conservation committee, or similar name.

County committee means a FSA county or area committee established in accordance with section 8(b) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)).

Designated conservationist means the NRCS official, usually the district conservationist, whom the State Conservationist designates to be responsible for the program or compliance requirement to which this part is applicable.

Final technical determination means a preliminary technical determination issued under the Highly Erodible Land and Wetland Conservation (HELC/WC) provisions found in 7 CFR part 12 that have become final, and thus, appealable under sections 8 or 10 of this final rule.

Hearing means an informal appeal proceeding, either before the NRCS State Conservationist or the FSA county committee that affords a participant opportunity to present testimony and documentary evidence to show why an adverse program decision is in error and why the adverse decision should be reversed.

Mediation means a process in which a neutral third party, the mediator, meets with the disputing parties, usually the participant and the agency. Through mediation, the parties have the opportunity to work together with the assistance of the mediator to: improve communications, understand the relevant issues, develop and explore alternatives, and reach a mutually satisfactory resolution.

Mediator means a neutral third party who serves as an impartial facilitator between two or more parties to assist them in resolving a dispute. The mediator does not take sides or render decisions on the merits of the dispute. The mediator assists the parties in identifying areas of agreement and encourages the parties to explore potential options toward resolution.

Participant means any individual or entity who has applied for, or whose right to participate in or receive, a payment or other benefit in accordance with any program administered by NRCS to which the regulations in this part apply and is affected by a decision of NRCS. The term does not include those individuals or entities excluded in the definition of participant published at 7 CFR 11.1.

Preliminary technical determination means the initial written decision by NRCS for a technical matter under HELC/WC which has not become final under this part.

Program decision means a written decision by NRCS concerning eligibility for program benefits, program administration, or program implementation and based upon

applicable regulations and program instructions and not a technical determination made solely for the HELC/WC provisions. Program decisions may include technical matters relative to the specific conservation program. These are final decisions upon receipt by the program participant.

Qualified mediator means a mediator who is accredited under State law in those States that have a mediation program certified by USDA pursuant to 7 CFR part 785, or in those States that do not have a mediation program certified by USDA, an individual who has attended a minimum of 40 hours of core mediator knowledge and skills training and, to remain in a qualified mediator status, completes a minimum of 20 hours of additional training or education during each 2-year period. Such training or education must be approved by USDA, an accredited college or university, or one of the following organizations: State Bar, a State mediation association, a State approved mediation program, or a society of dispute resolution professionals.

Reconsideration means a subsequent consideration of a preliminary technical determination by the designated conservationist or the State Conservationist.

Secretary means the Secretary of Agriculture.

State Conservationist means the NRCS official, or his or her designee, in charge of NRCS operations within a State.

Title XII means Title XII of the Food Security Act of 1985, as amended, 16 U.S.C. 3801 et seq.

Verbatim transcript means the official, written record of proceedings of a hearing on a decision appealable under this part.

§ 614.3 Decisions subject to informal appeal procedures.

(a) This part applies to NRCS adverse program decisions and technical determinations made with respect to:

(1) Conservation programs and regulatory requirements authorized under Title XII, including:

- (i) Conservation Security Program;
- (ii) Conservation Stewardship Program;
- (iii) Conservation Reserve Program and the Conservation Reserve Enhancement Program;
- (iv) Environmental Quality Incentives Program, including the following:
 - (A) Agricultural Water Enhancement Program,
 - (B) Conservation Activity Plans,
 - (C) Colorado River Basin Salinity Control,
 - (D) Conservation Innovation Grants,
 - (E) Ground and Surface Water Conservation Program,
 - (F) Klamath Basin Program, and
 - (G) Organic Program Initiative;
- (v) Farm and Ranch Land Protection Program;
- (vi) Grassland Reserve Program;
- (vii) Highly Erodible Land Conservation;
- (viii) Wetland Conservation;

- (ix) Wetlands Reserve Program and Wetlands Reserve Enhancement Program; and
 - (x) Wildlife Habitat Incentive Program.
 - (2) Non-Title XII conservation programs or provisions, including:
 - (i) Agriculture Management Assistance Program;
 - (ii) Emergency Watershed Protection Program including Flood Plain Easements;
 - (iii) Great Lakes Restoration Initiative;
 - (iv) Healthy Forest Reserve Program;
 - (v) Water Bank Program;
 - (vi) Watershed Protection and Flood Prevention Program; and
 - (3) Any other program to which this part is made applicable.
- (b) With respect to matters identified in paragraph (a) of this section, participants may appeal adverse decisions concerning:
- (1) Denial of participation in a program;
 - (2) Compliance with program requirements;
 - (3) Issuance of payments or other program benefits to a participant in a program;
 - (4) Technical determinations made under Title XII HELC/WC provisions;
 - (5) Technical determinations or program decisions that affect a participant's eligibility for USDA program benefits;
 - (6) The failure of an NRCS official issue a technical determination or program decision subject to this part (“failure to act”); and

(7) Incorrect application of general policies, statutory or regulatory requirements.

(c) (1) Only a participant directly affected by a program decision or a technical determination made by NRCS may invoke the informal appeal procedures contained in this part.

(2) In order for the appeal request to be effective, the participant must personally make a written request for appeal that is signed by the participant identified in paragraph (c)(1) no later than 30 days after receipt of the adverse decision.

(d) Appeals of adverse final technical determinations and program decisions subject to this part are also covered by the NAD rules of procedure, set forth at 7 CFR part 11, and by the FSA county committee appeals process, set forth at 7 CFR parts 11 and 780 for informal appeals of Title XII decisions.

§ 614.4 Decisions not subject to informal appeal procedures.

(a) Decisions that are not appealable under this part include:

(1) Any general program provision, program policy, or any statutory or regulatory requirement that is applicable to all similarly situated participants, such as:

- (i) Program application ranking criteria;
- (ii) Program application screening criteria;
- (iii) Published soil surveys; or

- (iv) Conservation practice technical standards included in the local field office technical guide or the electronic FOTG (eFOTG).
 - (2) Mathematical or scientific formulas established under a statute or program regulation and a program decision or technical determination based solely on the application of those formulas;
 - (3) Decisions made pursuant to statutory provisions or implementing regulations that expressly make agency program decisions or technical determinations final;
 - (4) Decisions that are based on technical information provided by another Federal or State agency, e.g., lists of endangered and threatened species;
 - (5) Corrections by NRCS of errors in data entered on program contracts, easement documents, loan agreements, and other program documents; or
 - (6) Decisions issued by the Office of the General Counsel, in the exercise of authority delegated to it by the Attorney General, concerning the application of real property title standards issued by the Attorney General.
- (b) Complaints involving discrimination in program delivery are not appealable under this part and are handled under the existing USDA civil rights rules and regulations.
- (c) Appeals related to contractual issues that are subject to the jurisdiction of the Civilian Board of Contract Appeals are not appealable under the procedures within this part.

(d) Where NRCS is unable to fund an application for program participation due to a lack of funds. The agency may not deny appeal of the underlying computations used to rank and prioritize the application.

§ 614.5 Reservation of authority.

The Secretary of Agriculture, Chief of NRCS, if applicable, or designee, reserves the right to make a determination at any time on any question arising under the programs covered under this regulation within their respective authority, including reversing or modifying in writing, with sufficient reason given therefore, any program decision or technical determination made by an NRCS official.

§ 614.6 Agency records and decision notices.

(a) All NRCS decisions under this part are based upon an agency record. NRCS will supplement the agency record, as appropriate, during the informal appeals process.

(b) NRCS notifies participants of the agency's preliminary and final technical determinations and program decisions through decision notices. By certified mail, return receipt requested, NRCS will send to the participant a decision notice within 10 working days of rendering a technical determination or program decision. In lieu of certified mail, NRCS may hand deliver notices to participants with written acknowledgment of delivery by the participant. Each decision notice contains the following:

- (1) The factual basis for the technical determination or program;
- (2) The regulatory, statutory, or policy basis for the technical determination or program decision; and

(3) Information regarding any informal appeal rights available under this part; the process for requesting such appeal; and the procedure for requesting further review before the FSA county committee pursuant to 7 CFR part 780 or NAD pursuant to 7 CFR part 11.

§ 614.7 Preliminary technical determinations.

(a) A preliminary technical determination is limited to those determinations made pursuant to the HELC/WC provisions (16 U.S.C. 3801, et seq.) and becomes final 30 days after the participant receives the decision, unless the participant files an appeal with the appropriate NRCS official as indicated in the decision notice requesting:

- (1) Reconsideration with a field visit, office visit, or other designated location meeting site in accordance with paragraphs (b) and (c) of this section; or
- (2) Mediation as set forth in § 614.11.

(b) (1) If the participant requests reconsideration with a field visit, office visit, or other location visit, the designated conservationist, participant, and at the option of the conservation district, a district representative will make a field or office visit for the purpose of gathering additional information and discussing the facts relating to the preliminary technical determination. The participant may also provide any additional documentation to the designated conservationist.

- (2) Within 15 days of the field or office visit, the designated conservationist, based upon the agency record as supplemented by the field visit and any participant submissions, will reconsider his or her preliminary technical determination.

(3) If the reconsidered determination is no longer adverse to the participant, the designated conservationist will issue the reconsidered determination as a final technical determination.

(4) If the preliminary technical determination remains adverse, then the designated conservationist will forward the revised decision and agency record to the State Conservationist for a final determination pursuant to paragraph (c) of this section, unless further appeal is waived in writing by the participant in accordance with paragraph (d) of this section.

(c) The State Conservationist will issue a final technical determination to the participant as soon as is practicable after receiving the reconsideration and agency record from the designated conservationist. The technical determination issued by the State Conservationist becomes a final NRCS technical determination upon receipt by the participant. Receipt triggers the running of the 30-day timeframe to appeal to NAD, or if applicable, to the FSA county committee.

(d) In order to address application needs or resource issues on the ground immediately (expedited finality), a participant may waive, in writing to the State Conservationist, the reconsideration rights stated in paragraph (a) of this section so that a preliminary technical decision becomes final before the expiration of the 30 day appeal period.

§ 614.8 Final technical determinations.

(a) Preliminary HELC/WC technical determinations become final and appealable:

(1) Thirty days after receipt of the preliminary technical decision by the participant unless the determination is appealed in a timely manner as provided for in this regulation.

(2) Thirty calendar days after the beginning of a mediation session if a mutual agreement has not been reached by the parties; or

(3) Upon receipt by the participant of the final technical determination issued on reconsideration as provided in § 614.7(c).

(b) The participant may appeal the final technical determination issued under the HELC/WC provisions to:

(1) The FSA county committee pursuant to 7 CFR part 780; or

(2) NAD pursuant to 7 CFR part 11.

§ 614.9 Program decisions.

(a) Program decisions are final upon receipt of the program decision notice by the participant. Program decisions include all decisions issued by NRCS for programs that NRCS administers separate from the HELC/WC provisions. The participant has the following options for appeal of the program decision:

(1) An informal hearing before NRCS as provided for in paragraph (b) through paragraph (d) of this section;

(2) Mediation as provided for in § 614.11;

(3) An informal hearing before the FSA county committee pursuant to 7 CFR part 780 if the program decision is made under Title XII; or

(4) A hearing before NAD pursuant to 7 CFR part 11.

(b) A program participant must file an appeal request for a hearing with the appropriate State Conservationist as indicated in the decision notice within 30 calendar days from the date the participant received the program decision.

(c) The State Conservationist may accept a hearing request that is untimely filed under paragraph (b) of this section if the State Conservationist determines that circumstances warrant such an action.

(d) The State Conservationist will hold a hearing no later than 30 days from the date the appeal request was received. The State Conservationist will issue a written final decision no later than 30 days from the close of the hearing.

(e) NRCS will provide notice of the right to appeal to NAD on program decisions when equitable relief is denied by the Chief or the State Conservationist.

§ 614.10 Appeals before the Farm Service Agency county committee.

(a) In accordance with 7 CFR part 780, a participant may appeal a final technical determination or a program decision to the FSA county committee for those decisions made under Title XII.

(b) When the FSA county committee hearing the appeal requests review the technical determination by the applicable State Conservationist prior to issuing their decision, the State Conservationist will:

- (1) Designate an appropriate NRCS official to gather any additional information necessary for review of the technical determination;
- (2) Obtain additional oral and documentary evidence from any party with personal or expert knowledge about the facts under review; and

(3) Conduct a field visit to review and obtain additional information concerning the technical determination.

(c) After the actions set forth in paragraphs (b)(1) through (3) of this section are completed, provide the FSA county committee with a written technical determination in the form required by § 614.6(b)(1) through (2) as well as a copy of the agency record.

§ 614.11 Mediation.

(a) A participant who wishes to pursue mediation must file a request for mediation under this part with the official designated in the decision notice no later than 30 days after the date on which the decision notice was received. Participants in mediation are normally required to pay fees established by the mediation program.

(b) A dispute will be mediated by a qualified mediator as defined at § 614.2(n).

(c) The parties will have 30 days from the date of the first mediation session to reach a settlement agreement. This date can be extended upon agreement of the parties. The mediator will notify the State Conservationist whether the parties have reached an agreement.

(d) Settlement agreement reached during, or as a result of, the mediation process must be in writing, signed by all parties to the mediation, and comply with the statutory and regulatory provisions and policies governing the program. In addition, the participant must waive all appeal and judicial rights as to the issues resolved by the settlement agreement.

(e) At the outset of mediation, the parties must agree to mediate in good faith.

NRCS demonstrates good faith in the mediation process by, among other things:

- (1) Designating an NRCS representative in the mediation;
- (2) Making pertinent records available for review and discussion during the mediation; and
- (3) To the extent the NRCS representative does not have authority to bind the agency, directing the NRCS representative to forward, in a timely manner, any written agreement proposed in mediation to the appropriate NRCS official for consideration.

(f) Mediator impartiality. (1) No person may serve as mediator in an adverse program dispute who has previously served as an advocate or representative for any party in the mediation.

- (2) No person serving as mediator in an adverse program dispute may thereafter serve as an advocate for a participant in any other proceeding arising from or related to the mediated dispute including, without limitation, representation of a mediation participant before an administrative appeals entity of USDA or any other Federal agency.

(g) Confidentiality. Mediation is a confidential process except for those limited exceptions permitted by the Administrative Dispute Resolution Act at 5 U.S.C. 574. As a condition of participation, the participants and any interested parties joining the mediation must agree to the confidentiality of the mediation process. The mediator will not testify in administrative or judicial proceedings concerning the issues discussed in

mediation, nor submit any report or record of the mediation discussions, other than the mediation agreement or the mediation report, except as required by law.

§ 614.12 Transcripts.

(a) No recordings will be made of any informal hearing conducted under § 614.9.

In order to obtain an official record of a hearing, a participant may obtain a verbatim transcript as provided in paragraph (b) of this section.

(b) Any party to an informal hearing appeal under § 614.9 may request that a verbatim transcript is made of the hearing proceedings and that such transcript is made the official record of the hearing. The party requesting a verbatim transcript must pay for the transcription service and provide a copy of the transcript to NRCS at no charge.

§ 614.13 Appealability review.

If NRCS states that a decision is not adverse to the individual participant, and thus, no right to appeal exists, NRCS will notify the participant that he may seek review of that determination from the NAD Director.

§ 614.14 Computation of time.

(a) The word “days” as used in this final rule means calendar days, unless specifically stated otherwise.

(b) Deadlines for any action under this part, including deadlines for filing and decisions which fall on a Saturday, Sunday, Federal holiday, or other day on which the

relevant NRCS office is closed during normal business hours, will be extended to close of business the next working day.

§ 614.15 Implementation of final NAD determinations.

(a) No later than 30 days after a NAD determination becomes a final administrative decision of USDA, NRCS will implement the determination.

(b) Biannually, NRCS must file a report on the status of implementation of final administrative determinations in accordance with section 14009 of the 2008 Farm Bill.

§ 614.16 Participation of third parties in NRCS proceedings.

When an appeal is filed under this part, NRCS will notify any third party whose interests may be affected of the right to participate as an appellant in the appeal. If the third party declines to participate, then NRCS' decision will be binding as to that third party as if the party had participated. If a formal hearing is conducted by NAD, third party issues will be decided by NAD.

§ 614.17 Judicial review.

A participant must receive a final determination from NAD pursuant to 7 CFR part 11 prior to seeking judicial review in any U.S. District Court of competent jurisdiction.

Signed this ____29th ____ day of ____May____, 2012, in Washington, D.C.

Dave White,
Vice President, Commodity Credit Corporation, and
Chief, Natural Resources Conservation Service.

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